

February 6, 2018

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

In the Matter of the  
Personal Restraint of

ANGELINO L. PENA

No. 50873-7-II

UNPUBLISHED OPINION

SUTTON, J. — Angelino Pena seeks relief from personal restraint imposed following his 2014 conviction for first degree assault. He argues that the evidence against him was insufficient for the jury to find him guilty beyond a reasonable doubt and that he received ineffective assistance of counsel when his trial counsel did not request a lesser included instruction for third degree assault.

RCW 10.73.090(1) requires that a petition be filed within one year of the date that the petitioner's judgment and sentence becomes final. Pena's judgment and sentence became final on July 15, 2016, when we issued the mandate following his direct appeal. RCW 10.73.090(3)(b). He did not file his petition until September 11, 2017, more than one year later. Unless he shows

that one of the exceptions contained in RCW 10.73.100 applies or that his judgment and sentence is facially invalid, his petition is time-barred. *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532-33, 55 P.3d 615 (2002).

Pena argues that RCW 10.73.100(1), (2), and (4) exempt his petition from the time bar. He does not present newly discovered evidence or show that the assault statute is unconstitutional, so RCW 10.73.100(1) and (2) are inapplicable. But RCW 10.73.100(4) does exempt petitions asserting insufficient evidence. “The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The State presented evidence that Pena and the victim had an argument about Pena’s brother, that Pena shot the victim in the face, and that Pena put the gun in his waistband. *State v. Pena*, noted at 192 Wn. App. 1037, 2016 WL 555382, at \*1, *review denied*, 185 Wn.2d 1037 (2016). This evidence is sufficient for a rational trier of fact that Pena shot the victim with the intent to kill or cause great bodily harm, thereby committing first degree assault. *See State v. Woo Won Choi*, 55 Wn. App. 895, 906-07, 781 P.2d 505 (1989).

As to Pena’s claim of ineffective assistance of counsel, this court rejected his argument in his direct appeal. Unless he shows that the interests of justice require it, he cannot raise this argument again in this petition. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 303, 868 P.2d 835, 870 P.2d 964 (1994). He makes no such showing.

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Pena fails to show grounds for relief from restraint. Accordingly, we deny Pena's petition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
SUTTON, J.

We concur:

  
WORSWICK, P.J.

  
JOHANSON, J.